IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 22, 204 Session

CHARLES MCRAE, ET AL. v. C. L. HAGAMAN, ET AL.

Appeal from the Chancery Court for Anderson County
No. 97CH5741 William E. Lantrip, Chancellor

No. E2004-00852-COA-R3-CV - FILED OCTOBER 25, 2004

After a real estate sale was completed, the purchasers discovered that a portion of the property was not included in the description although a proposed deed was furnished to them five (5) days before the closing. They had previously been forwarded a copy of a plat of the property, but they failed to compare the deed description with the plat. Suit was filed against the seller and his broker for rescission or damages for negligent misrepresentation. The seller was dismissed on motion for summary judgment from which no appeal was taken. A judgment for damages was entered against the broker who, *inter alia*, pleaded that the negligence of the purchasers-plaintiffs should be compared to any negligence on his part. The issue of comparative negligence was not brought to the Chancellor's attention, and thus not compared to the broker's negligence. We find substantial evidence of negligence on the part of the plaintiffs which, as a legal cause of their damages, should be compared to the negligence of the broker. The judgment is accordingly vacated and the case is remanded for this purpose.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and D. MICHAEL SWINEY, J., joined.

Jon G. Roach and Hanson R. Tipton, Knoxville, Tennessee, for appellant, W. Howard Henegar.

W. F. Shumate, Jr., Knoxville, Tennessee, for appellees, Charles McRae and Joanna McRae.

OPINION

I.

The owner ["Hagaman"] of Norris lakeside property listed it for sale with the Henegar Realty Company ["Henegar"] for $500,000.00, who contacted the plaintiffs ["McRae"] to ascertain their interest, if any, in purchasing the property which consisted of "approximately 37 acres, excluding

the lot retained by Hagaman adjacent to Steve Sumner." Hagaman, McRae and Mrs. McRae, McRae's father, Henegar and his partner McKamey went upon the property in July 1996. It is not disputed that Hagaman at that time and place pointed eastwardly and stated that he was keeping a portion of the property for his daughter. The portion to be retained was not fully elaborated. McRae agreed to purchase the property for the listed price and executed a "standard sales agreement", which, by addenda, provided, in *haec verba:*

Addendum to Sales Contract
July 8, 1996

Sales contract contingent upon the following conditions:

> Seller to provide survey of property. Property must amount to more than 34.5 area total area. Including lots with "reversionary clause".
>
> Seller to surrender all rights to property containing "reversionary clause" to buyer. Documents pertaining to these lots to be reviewed by an attorney at Buyer's expense.

Additional terms to sales contract:

> Buyer to pay closing cost not in excess of $1,000.00.
>
> Buyer to pay 25% of purchase price ($120,000 + $5,000 deposit) at closing and balance on or after January 1, 1997 but no later than February 18, 1997.
>
> Seller to provide any surveys or maps to the property in his possession or copies if still needed by Seller.

Hagaman thereupon employed a surveyor, Dean Orr, to survey the property and prepare a plat which was dated August 5, 1996. Hagaman delivered a copy of the plat to Henegar's office for further delivery to McRae, after identifying the tracts he had contracted to sell with a circle. Tract 5 was not circled. Its non-inclusion is the core of this controversy.

At that time, both McRae and Henegar were in California for personal and unrelated business. Henegar's partner, McKamey, faxed the plat to Henegar who delivered it to McRae at his address in Napa, California. Henegar testified that he told McRae that they "were getting the tracts circled on the plat" - Tracts 1, 2, 3, 4. McRae testified that Henegar said "they were getting everything shown on the plat," and that the significance of the circles was not discussed. It is significant that the plat revealed that the quantum of land was less than the minimum of 34.5 acres

contractually required. This diminution was expressly waived by McRae, who made no further inquiries.

In course Henegar returned to Tennessee. McRae consulted a lawyer, Ms. Agee, who apparently acted only as a conduit or liaison between McRae and the closing attorney, David Flitcroft. McRae was furnished a copy of the proposed *warranty deed* which described the four tracts [Tract 5 was not included], together with a three-quarter acre and a two-acre tract involving a right of reverter. The acreage of each tract of land was shown in the proposed deed, in addition to a metes and bounds description. The plat also identified Tract 1 - 26.748 acres; Tract 2 - 0.861 acres; Tract 3 - 0.443 acres; Tract 4 - 1.468 acres; and Tract 5 - 1.533 acres [which was not circled]. In addition to the August 5, 1996 plat, McRae had copies of the plats of the three-quarter sliver and the two (2) acre "reverter" tract, which was property that the Hagamans had conveyed to a previous purchaser to satisfy the three (3) acre minimum lot size required by Anderson County Subdivision Regulations but had retained a right of reverter.

The description in the proposed Deed made reference to the plat of the property dated August 27, 1996. The proposed Deed and the executed Deed are identical. The only difference between the August 5, 1996 plat and the August 27, 1996 plat[1], other than the date, is that the tract identified as "Tract 5" on the August 5, 1996 plat is identified as "Hagaman" on the August 27, 1996 plat. The change in labeling of the tract from "Tract 5" to "Hagaman" was done by Mr. Orr, the surveyor, as instructed by Hagaman.

The plaintiffs had the proposed deed and August 5 plat several days before the closing but apparently made little effort to compare the plat to the proposed deed. The transaction closed on September 13, 1996 at Mr. Flitcroft's office in Anderson County, Tennessee. The McRaes, who were still in California, had signed the closing documents and forwarded them by mail to Flitcroft.

II.

The Sales Agreement signed by the parties contained the following language:

> 6. CONDITION OF PROPERTY - INSPECTIONS AND WARRANTIES:
> Buyer(s) agrees to accept this property in it's "AS IS" condition under the terms of this section, unless otherwise specified. Buyer(s) agrees that he and/or she has inspected this property and has not relied upon any representation made by the agents in describing this property and understands that the agents involved in this transaction make no warranties regarding the property, including the physical condition of the building and other improvements.

[1]. This plat was prepared, apparently routinely, somewhat more formally, and delivered to McRae after the closing.

* * * * *

15. LEGALLY BINDING
THIS IS A LEGAL DOCUMENT, and each party to this contract must carefully and fully understand the terms and conditions as set forth in this real estate sales contract. Buyer(s) further understands and agrees that any agents representing this sale cannot warrant the condition of this property, or its structural soundness, any exact land boundaries, or the condition of the title. Buyer(s) agrees that they have inspected this property and they have not relied on any representations made by any agents. Buyer(s) further agree to accept this property in "AS IS" condition as a result of their inspections.

III.

After the transaction was closed Henegar met with McRae and his father, Palmer McRae, several times, one of which occurred at the Register of Deeds office in Clinton, the purpose of which, oddly enough, was to "identify the property that had been conveyed by the deed." The meeting was prompted by Palmer McRae who had compared the deed with the August 5, 1996 plat and discovered that the description for Tract 5 on the August 5, 1996 plat did not match Tract 5 in the deed.

This action was filed October 6, 1997 against Hagaman and Henegar, alleging that:

(1) the plaintiffs contracted to purchase approximately 37 acres from Hagaman for $500,000;

(2) Hagaman must provide a survey of the property "which must amount to more than 34.5 acres total area including lots with reversionary clause";

(3) the survey was furnished;

(4) Henegar made the express representation that the plaintiffs were acquiring from Hagaman all of the property shown on the survey;

(5) according to the survey which plaintiffs had previously been furnished, the property contained only 33.053 acres, which deficiency the plaintiffs waived;

(6) Tract 5 in the deed was not the same as Tract 5 on the plat, the latter of which was not included in the deed;

(7) each defendant intentionally or negligently misrepresented the facts surrounding Tract 5;

(8) the plaintiffs are entitled to a rescission of the transaction, or alternatively, for damages.

IV.

Hagaman responded that he knew nothing of any representations made by Henegar. He alleged that the plaintiffs were provided with a description of the property before the date of conveyance which was reviewed by their attorney, and that the *plaintiffs purchased "title insurance on the subject property further requiring an in-depth review of the conveyance*." He testified that "I specifically showed plaintiffs the location of the 1.533 acre tract (Tract 5) that is now in dispute and informed plaintiffs and all persons present that this tract was not for sale and even informed them that they could use the driveway on that tract until they completed their own driveway." Hagaman's motion for summary judgment was granted, and the plaintiffs have not appealed the judgment of dismissal. The case proceeded to trial against Henegar, as agent for the seller, Hagaman.

V.

Henegar argued that Hagaman advised all concerned that Tract 5 was not included in the proposed sale, and denied that he told the plaintiffs they were acquiring all of the property shown on the survey. He alleged that the deed was prepared by the plaintiffs' attorney and then reviewed by their attorney and "that it clearly reveals the land was not part of plaintiffs' purchase."

In his amended answer, Henegar alleged that the plaintiffs filed an action for damages against the closing attorney, David Flitcroft, alleging that he was negligent in failing to disclose that the plat of the property was not recorded, and was unrecordable because it did not comport with subdivision regulations. They alleged that had they known of the regulations they would not have purchased the property. Henegar further alleged that to the extent established by the proof and consistent with comparative fault principles the conduct of the plaintiffs, and of Mr. Flitcroft, must be considered and compared to any negligence of the defendants. He further alleged that the plaintiffs have attempted to prevent the finding of comparative fault on their part by failing to join him and Hagaman in the Flitcroft action and that his allegations in that case are contrary to and inconsistent with those alleged against him which should judicially estop his claim for damages in this action.

VI.

The Chancellor found that McRae and Henegar "were operating under the assumption that Tract 5 was included." He further found that both Henegar and McRae were misled by the first survey, and that Henegar negligently represented that Tract 5 was included in the conveyance, because of his statement to McRae that all of the tracts were to be sold. While McRae, who has a

Master's Degree in Business Administration, argues that "he lacked the expertise to read and understand the deed description" we cannot agree that this subjective belittlement entitles him to exoneration of his duty.[2] He was chargeable with notice, by implication, of every relevant fact. "If there is an [insufficiency] in any deed of record which a prudent person ought to examine, to produce an enquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the fact." ***Teague v. Sowder***, 121 Tenn. 132, 114 S.W. 484 (1908); *See, also,* ***Evans v. Tillett Bros. Const. Co.***, 545 S.W.2d 8 (Tenn. Ct. App. 1976). McRae had the opportunity to compare the deed description with the August 5, 1996 plat; he so acknowledged. Had he done so, he would have discovered that Tract 5 was not included in the conveyance. The Chancellor exonerated Henegar of fraud, but found him guilty of negligence, and entered a judgment against him for damages in the amount of $126,000.00.

Henegar appeals, and presents for review the issues of : (1) the propriety of the award of damages in the absence of proof that the plaintiffs relied upon any negligent misrepresentation by him; (2) whether the court erred in basing an award for damages by the consideration of parole testimony which modified the deed provisions; and (3) whether the plaintiffs were judicially estopped to bring this action by making inconsistent allegations in a separate action. Our review is *de novo* on the record with a presumption of correctness as to findings of fact. Tenn. R. App. P. 13(d); ***Union Carbide Corp v. Huddleston***, 854 S.W.2d 87 (Tenn. 1993). There is no presumption of correctness as to conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26 (Tenn. 1996).

At the outset we note the well-nigh truistic legal principle that a real estate agent for a seller has a duty to use reasonable care in determining that all representations made are true. ***Staggs v. Sells***, 86 S.W.3d 219 (Tenn. Ct. App. 2001); ***Wyner v. Athens Utility Bd.,*** 821 S.W.2d 597 (Tenn. Ct. App. 1991); ***Hughey v. Rainwater Partners***, 661 S.W.2d 690 (Tenn. Ct. App. 1983). We also note that the exculpatory provision, which is not seriously argued, is unenforceable as contrary to public policy although it may be considered in a generic sense. We further note that because he heard and observed the witnesses the Chancellor is better positioned than we are to analyze their credibility. ***Ferguson Harbor Inc. v. Flash Mkt Inc.***, 124 S.W.3d 541 (Tenn. Ct. App. 2003); ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412 (Tenn. 1995). Moreover, an argumentative response to this question permeates this entire record: Might McRae rely upon the mistaken representation of *Agent* Henegar which was contrary to the statement of *principal* Hagaman? Under the circumstances of this case we find that, at a minimum, McRae was further noticed of a pending difficulty.

To sustain the burden of proving negligent misrepresentation, the plaintiffs must satisfy the requirements of Section 552 of the Restatement (Second) of Torts. In ***Robinson v. Omer***, 952 S.W.2d 423 (Tenn. 1997), the Supreme Court defined the essential elements of a negligent misrepresentation action filed against a professional, holding that Tennessee has adopted Section 552

[2] Significantly, McRae's father discovered the problem apparently upon a cursory comparison of the deed to the plat.

of the Restatement (Second) of Torts "as the guiding principle in negligent misrepresentation actions against other professionals and business persons." Section 552 provides in pertinent part as follows:

> (1) One who, in the course of his business, professional or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The defendant argues that the key element lacking in the plaintiffs' proof is that the alleged loss was caused by the plaintiffs' justifiable reliance upon the information supplied by Henegar, because:

1. The Plaintiffs were put on notice in the Standard Sales Agreement, that they cannot rely and have not relied upon representations made by the agent.

2. The information concerning the property that was being sold and especially that that was not being sold was equally available for all parties. Where information is readily available to all parties a party cannot claim reliance of an alleged misrepresentation. Specifically, where the means of information are at hand and equally accessible to both parties so that, with ordinary diligence, they might rely on their own judgment, generally they must be presumed to have done so, or, if they have not informed themselves, they must abide the consequences of their own inattention and carelessness, citing ***Winstead v. First Tennessee Bank N. A. Memphis***, 709 S.W.2d 627 (Tenn. Ct. App. 1986).

3. Where a warranty deed by its own terms is clear and unambiguous having been drafted in metes and bounds and leaves no room for varying its interpretation, a party will be bound by the warranty deed which becomes the final contract that controls and governs and parol evidence is inadmissible to vary its terms. This is the doctrine of merger. ***Fuller v. McCallum & Robinson***, 22 Tenn. App. 143, 118 S.W.2d 1028, 1027 (Tenn. Ct. App. 1938).

4. The warranty deed is fully consistent with the plat of survey showing the circled Tract 1, 2, 3, and 4. A simple comparison of the two instruments would disclose that. Further, if the Plaintiffs, when comparing the Warranty Deed with the plat of the survey, were to observe the description referencing the August 27, 1996 plat, as they should in the exercise of ordinary prudence,

> when all they had was a plat dated August 5, 1996, they would be on notice that there was a later version of the plat which might differ.

These arguments are provocative, but when the evidence is considered in its totality we cannot find that the plaintiffs failed to prove that they relied on the representations of Henegar, whose conduct after the sale, as found by the Chancellor, was somewhat telling.[3] While we cannot find that the evidence preponderates against the finding of negligence on the part of Henegar, we find, as hereafter stated, that the negligence of McRae clearly contributed as a legal cause to the non-inclusion of Tract 5 in the conveyance.

IX.

The defendant argues that the doctrine of merger is recognized in Tennessee. This doctrine applies when an executory contract has been entered into between the parties for the sale and purchase of real estate, and subsequently the property is conveyed by a deed to the purchases named in the contract. The contract of sale which is an executory contract merges into the deed which becomes the final contract which governs and controls. ***Fuller v. McCallum & Robinson***, 22 Tenn. App. 143, 118 S.W.2d 1028, 1037 (Tenn. Ct. App. 1938). The doctrine provides that "the last agreement concerning the same subject matter that has been signed by all parties supersedes all former agreements, and the last contract is the one that embodies the true agreement." ***Magnolia Group v. Metropolitan Dev. & Housing Agency***, 783 S.W.2d 563, 566 (Tenn. Ct. App. 1989). The defendant argues that a conclusive presumption that the writing represents the parties' final agreement arises after the parties have reduced their agreement to a clear and unambiguous written contract, ***Faithful v. Gardner***, 799 S.W.2d 232, 235 (Tenn. Ct. App. 1990), and that the warranty deed by its own terms is clearly an unambiguous document having been drafted in metes and bounds and it leaves no room for varying its interpretation.

We would agree with this argument if the negligent misrepresentation by Henegar was focused on the sales contract vis-a-vis the warranty deed. But it is not. The misrepresentation focused on both instruments, and the doctrine of merger is not applicable. Neither is the parole evidence rule implicated. *See,* ***Cobble v. Langford***, 230 S.W.3d 194 (Tenn. 1950).

X.

The defendant next argues that the plaintiffs are estopped to file this action because they filed a suit for damages against attorney Flitcroft in the Circuit Court taking a position contrary to their position in the case at Bar.

In the suit against Flitcroft they allege that but for his negligence in failing to advise the plaintiff of the Anderson County Subdivision Regulation requiring a minimum lot size of 3 acres

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[3] There was testimony that Henegar, a few days after the closing, acknowledged that a mistake had been made. Henegar denied the statements attributed to him.

where no utility water was available the plaintiffs would not have purchased the property. This assertion is alleged to be at odds with the claims in the case at Bar that "but for Hagaman's and Henegar's misrepresentation, the plaintiffs would not have purchased the property."

The doctrine of judicial estoppel provides that a litigant who has deliberately taken a position in one judicial proceeding will not, as a matter of law, be allowed to advantage himself by taking an inconsistent position in another suit. ***Shell v. Law***, 935 S.W.2d 402 (Tenn. Ct. App.1996). While it is worth noting that appropriate motions in either court would have lessened the litigation burden, we cannot find that the plaintiffs are judicially estopped to maintain the Chancery action by filing the Circuit Court action.

XI.

McRae understood - was firmly on notice of the fact - that a portion of the property would not be sold. He therefore had a duty in consideration of all the circumstances, to determine the precise location of the exempted portion. The August 5, 1996 plat[4] was delivered by McRae with certain tracts identified by a circle. Both Hagaman and Henegar testified that only "circled tracts" were being sold. McRae disputes that he was told about the circled lots, but at the least he had a duty to enquire about the significance of the circles. The addenda to the Sales Contract - insisted upon by McRae - required him to employ an attorney to "review the documents." He employed an attorney who (1) never opened a file; (2) "never reviewed anything"; (3) never prepared a deed and "never intend[ed] to"; (4) never practiced real estate law and "never intend[ed] to." McRae never compared the plat to the deed. Had he done so, the non-inclusion of the disputed tract would have been evident. The Sales Contract provided that McRae could not rely on the representations of Henegar and thus he was, at the least, on enquiry notice. These non-exclusive instances of negligence as a legal cause of the omission of Tract 5 on the part of McRae, should be compared to the negligence of Henegar.

XII.

As we have shown, Henegar pleaded that to the extent established by the proof and consistent with comparative fault principles, the conduct of McRae, and Flitcroft, must be considered and compared to any negligence of the defendant. We agree. The record is replete with preponderant evidence of the negligence of McRae, but we find no evidence of negligence on the part of Flitcroft with respect to the precise issue before us.

The issue of comparative negligence was not addressed by the Chancellor. Although pleaded by Henegar it was neither argued nor briefed by him. But we are not aware of any decisional law which exempts the application of the doctrine from this case. *See*, ***McIntyre v. Balentine***, 833 S.W.2d 52 (Tenn. 1992). While comparative fault is not available as a defense for a defendant found

[4] A "final plat" was delivered to McRae after the sale was closed, and the area retained was named "Hagaman." This area was *not* circled on the August 5, 1996 plat.

guilty of fraud, ***Edwards v. Bruce***, 1996 WL 383294 (Tenn. Ct. App. 1996), we reiterate that Henegar was exonerated of fraud. The judgment rests entirely on a finding of negligence, and a number of cases hold that comparative fault applies to negligent misrepresentation claims. ***Glanton v. Beckley*** 1996 WL 709373 (Tenn. Ct. App. 1996); ***York v. Branell College of Memphis, Inc.***, 1993 WL 484203 (Tenn. Ct. App. 1993); ***Penn-America Ins. Co. v. CLT Partnership***, 106 F.3rd 401 (6th Cir. 1997); ***Killion v. Huddleston***, 2001 WL 1613882 (Tenn. Ct. App. 2001). We have determined that the negligence of McRae contributed as a legal cause to his damages. Hence, Henegar is liable only for the percentage of the plaintiffs' damages occasioned by Henegar's negligence. ***McIntyre***, at 58. The judgment is vacated and the case is remanded for appropriate findings consistent with the mandate of ***McIntyre***.[5] Costs are assessed to the appellees.

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WILLIAM H. INMAN, SENIOR JUDGE

[5] The amount of damages sustained by the plaintiffs is not questioned on appeal.